No. 82-694

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MARION V. COFFRAN AND CHARLES W. COFFRAN,
Petitioners,

v.

HITCHCOCK CLINIC, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In an effort to persuade this Court that the questions presented do not justify the grant of certiorari, respondent has misrepresented the thrust of the Petition and glossed over the serious institutional concerns presented by an expansive exercise of appellate review. Respondent would have this Court believe that the strength of the Petition rests on the argument that *any* appellate review of a new trial order is impermissible. While traditional teaching did indeed hold that a trial judge's ruling on a new trial motion based on the claim that the verdict was against the weight of the evidence was not reviewable by an appellate court, the Petition does not rest on the continued validity of this rule. Because the Brief in Opposition attempts to obfuscate the questions presented, a clarification of the contentions presented in the Petition may prove useful.

The decisions of this Court establish that "[t]he authority to grant a new trial . . . is confided *almost entirely* to the exercise of discretion on the part of the trial court." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (emphasis added). This Court has emphasized that, in reviewing such decisions, "[a]ppellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct." *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 485 (Brandeis, J.). Recently, however, some federal courts of appeals have, *as they have freely admitted*, departed from the view that the trial judge's discretion in ruling on new trial motions is very broad. As discussed in the Petition, the reasons proffered for expanding the scope of appellate review cannot withstand scrutiny. And, the adverse consequences which flow from an overly expansive exercise of appellate review are, petitioners submit, unacceptable.[1]

A. This Court should grant certiorari to control an undue expansion of review by the courts of appeals.

Respondent does not contest the statements in the Petition that the court below, in reviewing an order granting a motion for a new trial, followed the "modern trend" which allows expanded appellate scrutiny, and that the result of this "modern trend" is to diminish the discretion traditionally accorded the trial judge as to such orders. The Petition and the Brief in Opposition disagree as to whether this development is salutary.

The discretion traditionally accorded the trial judge's review of new trial orders was based upon historical experience and a realistic assessment of the relative competence of the trial

[1] The Brief in Opposition contends (Br. in Opp. 1) that the issue presented by the Petition was not raised in the court below. This is quite unfounded. The contention made by the petitioners in the court of appeals was that the trial court had not abused its discretion in granting a new trial. (See Brief printed in Appendix to Brief in Opposition.) Petitioners emphasized that this standard is very narrow. What the court of appeals did was to follow the "modern trend," review and weigh the evidence *itself*, and then substitute *its* view of the weight of the evidence for that of the trial judge. The correctness of *this* scope of review is the issue raised in the Petition, and that is precisely the issue which was raised before the court of appeals.

judge and the court of appeals. At common law, the trial judge's exercise of his *duty*, in appropriate cases, to grant a new trial was not considered to be "in derogation of the right of trial by jury but. . . [was viewed as] one of the historic safeguards of that right." *Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350, 353 (4th Cir. 1941)(Parker, J.). In exercising a power that has traditionally been regarded as an essential attribute of trial by jury, a trial judge is required to make a decision which is, by its very nature, highly discretionary. The trial judge, who hears the witnesses and plays the closest and most vital judicial role in the fact-finding process, is in a unique position to exercise the professional judgment called for by a new trial motion based on the ground that the verdict was against the clear weight of the evidence.[2] Therefore, a trial judge's ruling on such a motion would only be reversed "in the most exceptional circumstances." *Id.* at 354.

The decision below illustrates the soundness of the traditional rule. The court of appeals did state that it would only reverse if it found an abuse of discretion. The court emphasized, however, that it subscribed to the "modern trend" which "is away from earlier decisions that the trial judge's discretion is virtually unlimited." (683 F.2d at 6; Pet. App. 3a.) Moreover, the course actually followed by the court of appeals is more instructive than its recitation of the standard of review. The court engaged in a detailed weighing of the evidence and made its own credibility determinations. The court ignored the well-recognized principle that increased deference to the district judge is required in complex cases.[3] Finally, the court of

[2] As the record indicates, there can be no doubt that the trial judge *did* exercise his professional judgment. He granted only *one* of petitioners' post-trial motions, ordering a new trial, not a j.n.o.v., as to *one* of the defendants on the ground that the verdict was against the clear weight of the evidence. After careful consideration, the trial judge rejected the testimony of the defendants' expert (upon whom the court of appeals relied).

[3] Although the First Circuit purported to rely on *Lind v. Schenley Industries Inc.*, 278 F.2d 78 (3d Cir. 196[illegible]), *cert. denied*, 364 U.S. 835, to justify its expansive standard of review, a careful reading of *Lind* and of nearly every other appellate decision adopting the "modern trend" indicates

(footnote continues)

appeals compartmentalized the proof and based its holding on the insufficiency of the evidence on one element of petitioners' case.

The First Circuit's approach turns the traditional principles governing appellate review of new trial orders on their head. The court's approach necessarily impinges on the *discretion* of the trial judge to grant a new trial motion when he—in the exercise of his professional *judgment*—determines that the case should be reconsidered by a second jury. This expanded scope of appellate review raises serious institutional concerns. It disrupts the balance between trial and appellate courts and, among other things, encourages a proliferation of appeals.[4]

Properly understood, the appellate role, when reviewing the grant of a motion for a new trial, is to "see whether there can have been any basis in reason for the trial judge's conclusion as to the weight of the evidence and the injustice of the verdict." *Lind v. Schenley Industries Inc.*, 278 F.2d 79, 91 (3d Cir. 1960) (Hastie and Kalodner, JJ., dissenting), *cert. denied*, 364 U.S. 835. This view of the appellate function recognizes that the trial judge, when he determines that justice requires *reconsideration* by a second jury, does not *substitute* his view of the evidence for that of the first jury. The grant of a motion for a new trial does not result in the entry of judgment for the verdict-loser. "Thus, the essential institution of jury trial is respected and an expedient middle ground is maintained between the absence of any control over a jury's verdict on conflicting evidence, on the one hand, and judicial usurpation of the fact finding function, on the other." *Lind, supra*, at 91 (Hastie and Kalodner, JJ., dissenting).

(footnote continued)

that the expansive standard of review, regardless of its validity, was erroneously applied by the First Circuit in this case, because of the case's manifest complexity and the existence of possible jury confusion. The First Circuit's reversal in *this* instance highlights petitioners' concern that the "modern trend" permits a scope of review unwarranted and unsanctioned by the decisions of this Court.

[4] Regardless of the number of times new trial orders have actually been reversed, the detailed review engaged in by the First Circuit will undoubtedly encourage future appeals of *every* new trial order issued on the basis of the weight of the evidence.

This Court's consideration is necessary in order to prevent the undue expansion of appellate power and to preserve the traditional role of the trial judge as an "historic safeguard" of the right to trial by jury.

B. This Court should clarify the appropriate standard of appellate review of new trial orders.

Respondent maintains that there is no confusion in the courts of appeals as to the proper standard of review of orders granting new trial motions. Both the Brief in Opposition and the case law, however, indicate the fallacy of this assertion.

For example, in discussing the court of appeals' detailed review of the evidence on whether a certain test would have revealed an abnormal eosinophil count, respondent states: "[t]he court of appeals . . . concluded that the jury could reasonably have believed the ample evidence presented by the defendant on this point." (Br. in Opp. 9.) Contrary to respondent's suggestion, the conclusion that a reasonable jury could have found in respondent's favor on this point does not dispose of the new trial issue. Although there should be no reason for uncertainty, respondent's suggestion appears to repeat the error of confusing the standard for a directed verdict (or j.n.o.v.) with the standard which governs the granting of new trial motions.

Similarly, in *Williams v. City of Valdosta*, 689 F.2d 964 (11th Cir. 1982), the court of appeals, after noting the confusion which exists as to whether a district judge can consider the credibility of witnesses in ruling on a new trial motion, also appears to have confused the directed verdict or j.n.o.v. standard with the standard governing motions for a new trial. In reversing the grant of a motion for a new trial, the court stated: "Apparently, there is disagreement over whether the trial judge is permitted to make credibility choices when weighing all the evidence . . . . In our view, the authorities suggest that the trial judge should not substitute his own credibility choices and inferences for the reasonable credibility choices and inferences made by the jury." *Id.* at 973 n.7. Although this statement accurately describes the district judge's role in ruling on a

j.n.o.v. motion, it does not, and should not, apply to a new trial motion. Any distinction between the two would otherwise be meaningless.

Although a trial judge is not to act as a 13th juror, he is required to weigh the evidence, and a motion for a new trial can be granted "even though there may be substantial evidence which would prevent the direction of a verdict." *Aetna Casualty,* 122 F.2d at 352-53. The confusion which exists can only serve to undermine the trial judge's discretion to grant a new trial motion when—in the exercise of his judicial function—he believes that justice requires that a case be reconsidered by a second jury.

CONCLUSION

This Court should review the "modern trend" towards an increased scope of appellate review of new trial orders. This Court's consideration is necessary in order to prevent the undue expansion of appellate power and to clarify the appropriate scope of appellate review.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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